

# United States Department of Agriculture,

## OFFICE OF THE SECRETARY.

### NOTICE OF JUDGMENT NO. 1159.

(Given pursuant to section 4 of the Food and Drugs Act.)

#### ADULTERATION AND MISBRANDING OF VINEGAR.

On or about January 31, 1911, the United States Attorney for the District of Minnesota, acting upon the report of the Secretary of Agriculture, filed a libel for seizure and condemnation in the District Court of the United States for said district against 100 barrels of vinegar, in the possession of Barrett & Barrett (Inc.), St. Paul, Minn., alleging that the product was transported, sold, and consigned, on the 19th day of November, 1910, from the city of Chicago, by Spielman Bros. Co., manufacturers, to Barrett & Barrett, St. Paul, Minn., and was within the jurisdiction of the court, in the original unbroken packages. Each of the said barrels was labeled: "Guaranteed Cider Vinegar, 6 per centum. Spielman Bros. Co., mfgrs., 7916 B St., St. Paul, Minn."

Analyses of samples taken from this shipment showed the following results:

|  | Grams per 100 cc. |
|--|-------------------|
| Alcohol (per cent by volume).....                    | 0.28              |
| Glycerol.....  | .14               |
| Solids.....  | 2.55              |
| Nonsugar solids.....                                 | 1.53              |
| Reducing sugar invert.....                           | 1.02              |
| Per cent sugar in solids.....                        | 40.0              |
| Polarization direct, temperature 20° C.....          | -0.6              |
| Ash.....   | .47               |
| Ash, insoluble in water.....                         | .034              |
| Alkalinity of soluble ash (cc N/10 acid 100 cc)..... | 52.4              |
| Soluble phosphoric acid (mgs per 100 cc).....        | 24.7              |
| Insoluble phosphoric acid (mgs per 100 cc).....      | 8.1               |
| Acid, as acetic.....                                 | 5.90              |
| Fixed acid, as malic.....                            | .017              |
| Lead precipitate.....                                | heavy             |
| Color, degrees, brewer's scale (0.5 in. cell).....   | 7.5               |
| Color removed by fuller's earth..... per cent..      | 45                |
| Total phosphoric acid in ash.....                    | 32.8              |
| Alcohol precipitate.....                             | .14               |
| Pentosans.....                                       | .13               |
| Ratio of ash to nonsugars.....                       | 1:3.5             |

Adulteration was charged in the libel because, as shown by said analysis, a dilute solution of acetic acid and a product high in reducing sugar and foreign mineral matter had been mixed with and substituted for said vinegar so as to lower and reduce its quality and strength. Misbranding was alleged because said product was labeled "Cider vinegar" whereas in fact said product was not a cider vinegar but a mixture of cider vinegar and a dilute solution of acetic acid and a product high in reducing sugar and foreign mineral matter; because an imitation cider vinegar, consisting of the aforesaid substances, was offered for sale under the distinctive name of another article, to wit, cider vinegar; because the same was labeled so as to mislead and deceive the purchaser.

The Spielman Bros. Co., a corporation, intervened as claimants and filed an answer to the above libel, denying the allegations of adulteration and misbranding of said product and setting up the defence in law that the court was without jurisdiction in the premises for the reason that said libel was filed prior to seizure of the 100 barrels of vinegar mentioned therein. The case having come on for trial before the court without a jury, testimony and arguments of counsel were heard; motions on behalf of claimant for judgment in its favor were interposed and overruled, whereupon the court delivered its judgment finding for the libellant on all the issues of law and fact involved, and condemning and forfeiting the product to the United States.

Following are motions of counsel offered at the close of the testimony and rulings of the court thereon:

MOTION OF COUNSEL FOR CLAIMANT. UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA. UNITED STATES OF AMERICA V. ONE HUNDRED BARRELS OF VINEGAR.

Now at the close of all the evidence and after both the libellant and claimant have rested in the above entitled cause comes Spielman Bros. Co., claimant, by its attorneys, and moves the Court to dismiss the libel herein because said libel fails to allege and the evidence fails to show that prior to the institution of these proceedings the Secretary of Agriculture caused notice of the alleged misbranding and adulteration of the vinegar seized herein to be given to said claimant or to Barrett & Barrett or to any other person from whom samples were obtained; or that said claimant or said Barrett & Barrett or any other person was given an opportunity to be heard under the rules and regulations prescribed by the Three Secretaries mentioned in Section 3 of the Food and Drugs Act of June 30, 1906, under which this proceeding is had, on the question of whether or not the said vinegar was adulterated or misbranded within the meaning of said Act all as provided in Section 4 of said Act.

The COURT. While I have no case before me in which this matter has been decided, yet I have read the decisions which have been announced, and have considered the matter more or less. After such consideration I have come to the conclusion that in a proceeding under Section 10 of the Act of June 30, 1906, 34 Stat. L. 768, a preliminary investigation is not necessary. The construction of the word "penalties" in Section

5, is quite enlightening in determining this question. As has been said, Section 2 provides for a penalty against the person, and only provides for fines that are improperly called penalties. This investigation for which Section 4 provides, is an investigation the result of which must be certified by the Secretary of Agriculture to the District Attorney, and the District Attorney is then charged with the duty of prosecuting for the penalties. That on its face, in my judgment, would mean that the investigation refers to a case where there is a prosecution against the person, calling for penalties, and that it is not intended to cover a suit in rem for a condemnation and confiscation of the goods. That interpretation is strengthened by the decisions I have read, that notice should be given to the person liable for the penalty, and the person liable shall have an opportunity to be heard.

I will deny the motion accordingly.

Now, at the close of all the evidence in the above entitled cause and after both the libellant and the claimant have rested, comes Spielman Bros. Co., said claimant, by its attorneys, and moves the Court to dismiss the libel herein for want of jurisdiction because it appears from the evidence and the files and records herein that the goods libeled herein were not seized by the Marshal of this court until after the libel was filed herein and the monition issued thereon, whereas in order to confer jurisdiction on this Court the said goods should have been seized prior to the filing of said libel and the issuance of said monition.

The COURT. I have already decided that question. I will deny the motion.

Now, at the close of all the evidence and after both the libellant and claimant have rested in the above entitled cause, comes Speilman Bros. Co., claimant, by its attorneys, and moves the Court to dismiss the libel herein for want of jurisdiction because it does not appear from the evidence that the vinegar seized herein was shipped in interstate commerce for sale in original and unbroken packages or that said vinegar was transported in interstate commerce for sale within the meaning of Section 10 of the Food and Drugs Act of June 30, 1906, under which this proceeding is had.

The COURT. I think this is covered by a decision of the Supreme Court. I will therefore deny the motion.

Motions requesting the court to find the issues generally for the claimant and to enter a special finding of fact for the claimant were also denied. The decision of the court follows:

DECISION: UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA. UNITED STATES OF AMERICA V. ONE HUNDRED BARRELS OF VINEGAR.

Bulletin No. 65 of the Department of Agriculture, Bureau of Chemistry, entitled, Provisional Methods for the Analysis of Foods, adopted by the Association of Official Agricultural Chemists, November 14-16, 1901, contains a statement by William Frear, relating to the Determination of the Sources of a Vinegar, and gives some tests by which the genuineness of cider vinegar can be known. Circular No. 19, of the Department of Agriculture issued on June 26, 1906, establishes a standard for vinegar. The evidence in the case as well as that of the claimant as that of the government establishes the fact that a compound one-half of which is pure cider vinegar and the other half something else, will answer the tests mentioned in Bulletin No. 65, and meet the requirements of Circular No. 19. Such an adulterated article which would not be pure cider vinegar would nevertheless have to be pronounced such if these tests and standards are the only ones to be applied. The tests and standards contained in other literature upon the subject published prior to 1906, are substantially those stated in the bulletin and in the circular. The testimony of the claimant's experts is based on such tests and standards. It being proved that these are worthless, it follows that the opinions of such experts based on such standards to the effect that this article is pure cider vinegar are entitled to no great weight.

Is there any evidence in the case which shows some other test by reference to which the genuineness of this vinegar can be determined? The government is not limited to the standards mentioned in the bulletin and circular above referred to. In the trial of litigated cases the government is not even limited to methods of analysis which may be adopted under Regulation No. 4. The question in this case being whether or not the article is pure cider vinegar, the government can make use of any test which is an accurate one for deciding that question. Whether it is an accurate one or not must be decided by the Court from all the evidence in the case. The testimony shows that practically all commercial vinegar is now made by the generator process. This process, however, is of recent origin, so recent that there is no literature on the subject. Most of the literature relating to cider vinegar has reference to the other forms of production.

Does the evidence disclose any accurate test for the determination of pure cider vinegar made by the generator process? It is claimed by the government that the testimony of the witnesses Bender and Goodnow, supplemented by that of Doolittle, does show such a test. Without discussing this evidence in detail, it may be said that Bender, while in the employ of the government operated commercial cider vinegar factories for several months in New Jersey, Massachusetts and New York. He was there for the purpose of determining the constituents of cider vinegar. He made analyses every day of the cider stock before it entered the generator, and of the vinegar which came from the generator. Goodnow as an employee of the government was at generator factories in Michigan, New York and New Jersey. His purpose was the same as that of Bender, and he made daily analyses extending over months, as Bender did. The result of these experiments was, so far as glycerin is concerned, as follows: The maximum quantity of glycerin found by Goodnow in any sample in Michigan was 0.46, the minimum 0.24; in New York 0.31 and 0.25. Bender's results in New Jersey were maximum 0.45 and minimum 0.25. These experiments, extending through several months, in hundreds of samples show no sample with less than 0.24 or more than 0.46 of glycerin.

Glycerin is not mentioned in any way, either in the bulletin or in the circular above referred to. The government with these experiments as a basis, claims that it has discovered a new test the accuracy of which has been established by the evidence. This contention is sustained. That glycerin exists in cider stock is not denied by the claimant, though one of its experts claims that it was practically destroyed in the generator process. That claim is not in any way substantiated by the evidence nor by the literature relating to wine vinegar. The evidence in fact shows that but little glycerin is lost by passing the cider through the generator and converting it into vinegar.

The claimant's objections to this test are various. It says that no such test had ever been heard of before, and that there is nothing in the literature upon the subject of cider vinegar which in any way refers to such a test. If such an objection were to prevail it would prevent the application of any new test, no matter how thoroughly its accuracy might be established. Objections as to the knowledge which Bender and Goodnow had as to the character of the stock, to the manner in which they made their experiments, and the seasons of the year when they were made, have all been considered, but they are not deemed sufficient to destroy the value of such experiments.

The evidence having established the glycerin test as an accurate one for the determination of the purity of cider vinegar, it is now to be applied to the vinegar here in question. Samples B, C, and D, were taken on February 1, 1911. The smallest amount of glycerin found in any of Bender's or Goodnow's experiments being 0.24, these samples show respectively 0.13, 0.11, and 0.13. Samples E and F, known as the composite samples, were taken May 15, 1911. They are a mixture of equal quantities taken from six barrels. These samples show respectively 0.14 and 0.16 of glycerin.

The claimant objected to the method pursued in determining the amount of glycerin, and its experts characterized that method as entirely inaccurate. Such evidence does not substantially weaken that of the government chemists who testified to its accuracy. Moreover, the fact remains that using the same method in all these experiments, they always found a substance which they called glycerin. Applying precisely the same method to claimant's product, they found precisely the same substance, but in only one-half of the minimum quantity.

Claimant points out that the analyses of Bender and Goodnow were made as the vinegar came from the generator, while the samples in this case were analyzed, some of them six weeks after the vinegar was received in barrels in Saint Paul, some ten weeks afterwards, and some six months afterwards; but the evidence does not show that these lapses of time would materially affect the character of the vinegar stored in closed barrels.

The claim that the character of that vinegar was materially changed during that time by the formation of mother in it is not borne out by the evidence. No serious objection can be made to the manner in which the samples were taken. Even if the barrel had contained solid matter at the bottom of it, and if it had been shaken so as to mix this solid matter with the whole mass, the sample then drawn off would have been filtered before analysis, in order to get rid of that matter. The experts of the government basing their opinion upon the application of the glycerin test and upon other facts which appear in the analysis, particularly the high ratio between the ash and the non-sugar solids, testify that the claimant's product is not pure cider vinegar, but is a compound of about one-half cider vinegar and the other half distilled vinegar or diluted acetic acid, with the addition of other substances, the identity of which they could not determine. The opinion of the claimant's experts being based, as has been said, upon inadequate standards cannot outweigh the testimony of the government.

It may be worthy of remark that the evidence shows that the claimant has a cider vinegar factory in Michigan, and a distilled vinegar factory in Chicago; it also may be noted that the claimant presented no evidence to show whether it bought this vinegar, or manufactured it, and if it manufactured it out of what substance it was made.

The motion of the claimant at the close of the evidence to dismiss the libel, because no proceedings were instituted by the Secretary of Agriculture prior to the filing of the libel, such as are provided for in Section 4, of the Food and Drugs Act, is denied.

The investigation provided for in Section 4, seems to refer to cases in which there is to be a prosecution under Section 5, for the enforcement of penalties referred to in Section 2. It has no reference to proceedings for condemnation under Section 10.

The amendment to Regulation No. 5, issued February 6, 1911, evidently is based upon this construction of the law, for that provides that notice shall be given in every case to the party or parties against whom prosecution lies under this act. Moreover, the necessities of the proceeding under Section 10, could not abide the delay caused by an investigation such as is prescribed by Section 4. While that investigation is being carried on the property might disappear, or the packages be broken and become part of the general property of the State.

The motion of the claimant made at the close of the testimony to dismiss the libel, because the property was not seized before the libel was filed, is denied. *United States v. Two Barrels of Desiccated Eggs* 185 Fed. 302; *United States v. George Spraul & Co.* 185 Fed. 405.

The motion of the claimant made at the close of the testimony to dismiss the libel, on the ground that it does not appear that the vinegar seized here was shipped in interstate commerce for sale in original unbroken packages, is denied. *Hipolite Egg Company v. United States*, 219 U. S. —. The same case 34 Sup. Ct. Rep. 364.

The motions made by the claimant at the close of the testimony for a general finding in its favor and for special findings in its favor, are denied.

I make a general finding in this case in favor of the Government, and find that the vinegar seized under this libel, to-wit, 70 barrels, was both adulterated and misbranded.

Let judgment of condemnation and for the costs be entered against the 70 barrels of vinegar seized in this proceeding, as prayed for in the libel.

W. M. HAYS,  
*Acting Secretary of Agriculture.*

WASHINGTON, D. C., *October 5, 1911.*

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